Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID EFRON, individually, as a CLASS A SPECIAL PARTNER OF E.S. HOTEL ISLA VERDE, S.E., a PUERTO RICO CIVIL PARTNERSHIP, and FOR AND ON BEHALF OF THAT PARTNERSHIP,

Petitioner,

–against–

EMBASSY SUITES (PUERTO RICO), INC., EMBASSY SUITES (ISLA VERDE), INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

Whether the standard for determining whether a civil RICO complaint states a cause of action is different than the standard for determining whether a RICO indictment is sufficient, that is, whether the court may properly dismiss a civil RICO complaint where, had this been a criminal case, the action could not have been dismissed.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the court below were as follows:

Plaintiff-Appellant:

David Efron, Individually, as a Class A Special Partner of E.S. Hotel Isla Verde, S.E., a Puerto Rico Civil Partnership, and for and on behalf of that Partnership

Defendants-Appellees:

Embassy Suites (Puerto Rico), Inc.
Embassy Suites (Isla Verde), Inc.
Promus Hotel Corporation
Mora Development Corporation
First Big Island Steakhouse, Inc.
Cleofe Rubi Gonzalez
Moraima Cintron de Rubi
Emma M. Cancio-Santos
E.S. Hotel Isla Verde, S.E.
Corporacion de Desarrollo Hotelero
Fundacion Segarra Boerman E Hijos, Inc.

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OPINIONS BELOW

The decision of the Court of Appeals for the First Circuit is reported at 223 F.3d 12, and is reproduced in the Appendix at App. 1. The decision of the United States District Court for the District of Puerto Rico is reported at 47 F.Supp. 2d 200, and is reproduced in the Appendix at App. 19.

JURISDICTION OF THE COURT

This Court's jurisdiction rests on 28 U.S.C. § 1254. By decision and order dated August 14, 2000, the Court of Appeals for the First Circuit affirmed a final order and judgment of the district court dismissing the amended complaint. A timely filed petition for rehearing with suggestion for rehearing en banc was denied by order dated October 3, 2000, reproduced at App. 36.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 U.S.C. § 1961:

Definitions

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or

indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964:

Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

Petitioner David Efron, a limited or "special" partner in a partnership formed to develop and operate an Embassy Suites Hotel in Puerto Rico, commenced a civil RICO action in the United States District Court for the District of Puerto Rico. Seeking damages, Efron alleged in his first amended complaint ("complaint") that the defendants – several of the partnership's limited partners, its managing partner, and several affiliates –

had used the partnership, which was alleged to be the RICO enterprise, to engage in a pattern of racketeering activity, and that they conducted the partnership's affairs through a pattern of racketeering activity.

The complaint alleged that, from the very inception of the partnership, the defendants schemed to defraud Efron, as well as two other special partners. (Amended Complaint, ¶ 18) To this end, and as part of their scheme to defraud, defendants, among other things, caused the partnership to incur construction cost overruns (¶ 19); shifted non-partnership bills and expenses to the partnership (¶ 20); leased space to a restaurant owned by one of the defendants at an unconscionably low rate, failed to collect even that rate, and caused the partnership to pay expenses properly attributed to the restaurant (¶ 20); entered into a long term, commercially unreasonable lease with another commercial tenant (¶ 20); committed the partnership to a 20-year management agreement essentially ceding operational control of the business to one of the defendants (¶ 25); and caused the hotel to underperform and to achieve a low occupancy rate. (¶ 19) The complaint alleged that all of these acts were designed to, and did, harm the partnership's financial position and create cash shortfalls, which the defendant partners then used to justify repeated "capital calls" on the special partners. (¶ 19) The complaint alleged that this was done in order to defraud the special partners of additional money and/or to reduce ("squeeze down") their interests in the partnership. (¶ 22) This, the amended complaint alleged, was designed to allow two of the defendants to take unrestricted control of the enterprise. (¶ 19)

The complaint included allegations that the defendants had committed two or more predicate acts within ten years of each others, and had engaged in a "pattern of racketeering activity" as defined by 18 U.S.C. § 1961 consisting of predicate acts of mail fraud and wire fraud in violation of 18 U.S.C. § 1341 and § 1343. (¶¶ 38, 39, 40, 45) It alleged that the racketeering activity commenced in January of 1996 and continued through the time of the filing of the complaint (¶¶ 50,

51) [December 17, 1997], and that the predicate acts were "a regular way for the RICO Defendants to conduct or participate in" the enterprise. (¶ 52) It also alleged:

> The RICO Defendants have committed literally hundreds of acts, spanning nearly two years, involving multiple victims, all undertaken in pursuance of related schemes involving common actors ... [using] a myriad of mail and wire frauds to further the scheme ..." (¶ 53)

Paragraph 41 set forth 17 specific predicate acts of mail or wire fraud, describing ten mailings and seven wire communications alleged to have been in furtherance of the schemes to defraud. The first, a mailing, occurred on January 11, 1996. Other mailings alleged to have been in furtherance of the scheme, and constituting predicate acts of mail fraud, occurred on October 16, 1996, June 9, 1997, June 18, 1997, June 20, 1997, August 5, 1997, August 8, 1997, August 21, 1997, September 2, 1997, and September 22, 1997. In addition, according to the complaint, seven identified fax transmissions in furtherance of the scheme to defraud, and alleged to constitute predicate acts of wire fraud, occurred in August, September, and October of 1997.

The complaint also referenced other acts of mail fraud or wire fraud "not yet discovered or fully appreciated" committed by the defendants in the course of perpetrating the fraud. (¶ 36) Thus, the complaint alleged that the defendants "on multiple occasions placed various communications in post offices or authorized depositories for mail of the United States Postal Service." (¶ 36) Likewise, it alleged that each of the defendants "on multiple occasions made use of telephone and telegraph facilities to execute their scheme or artifice, or attempting so to do." (¶ 39), alleging that, by such actions, the RICO Defendants violated 18 U.S.C. § 1343 and committed wire fraud. (¶ 40) The complaint expressly alleged that the acts of mail and wire fraud "amount to or pose the threat of continued activity. (¶ 47)

The defendants moved to stay discovery and to dismiss the complaint on the ground, inter alia, that it failed to allege a pattern of racketeering activity, and thus failed to state a claim under RICO. The district court granted the motions. It dismissed the complaint on the ground that the continuity prong of the "continuity plus relationship" test for a "pattern of RICO activity," the standard first mentioned in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985), and elaborated upon in H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239-43 (1989), was not satisfied. In reaching that conclusion, the court first disregarded all allegations of wire fraud because there was no allegation that the fax transmissions traveled on interstate telephone lines. (App. 27) As to the ten specifically alleged mail frauds, the court ruled that two were not "in furtherance" of the scheme, and thus could not constitute mail fraud. (App. 26) This still left eight mailings, spanning a period of at least 20 months, but the district court noted that all but two of them occurred within a 90 day period. (App. 25) The court then concluded that "this period" was too short, and the acts too few, to establish a closed period of repeated conduct sufficient to establish a pattern of racketeering activity. (App. 26) Notwithstanding the complaint's express allegations that the scheme to defraud was designed to obtain additional moneys from the plaintiff and/or to squeeze down his interest in the partnership – ends which had not yet been fully achieved by the defendants – the court ruled that the plaintiff failed to allege a threat of ongoing criminal activity, because the predicate acts "all germinate from disputes arising during the startup phase of construction and leasing of the hotel" with no indication that the wire fraud and mail fraud would continue into the future "even if the scheme itself were to continue." (App. 27)

The Court of Appeals for the First Circuit affirmed, agreeing with the district court that plaintiff had failed to allege the continuity necessary to establish a pattern of racketeering activity, but disagreeing, in part, with the lower court's rationale. Unlike the district court, the appeals court considered all 17 of the specifically pled acts of mail and wire fraud, which spanned

a 21 month period, in assessing whether the requisite continuity was alleged. The Court recognized that this 21 month time frame "meets the Supreme Court's requirement for closed continuity of more than 'a few weeks or months'." (App. 10) But the court went on to opine that "it is not so long a period nor are there so many predicate acts that other indicators of continuity - or lack of them - are without significance." (App. 10) The Court then concluded that, under the closed continuity approach, as there was "only one scheme," with a "singular objective," and a "closed group of targeted victims," this was not "the kind of broad or ongoing criminal behavior at which the RICO statute was aimed." (App. 11-12)

The Court also concluded that "open-ended continuity" was not shown because "the scenario painted by Efron's pleadings does not threaten the 'long-term criminal conduct' with which Congress was concerned." (App. 14) In so ruling, the Court read the complaint to allege that the scheme's objective was to squeeze Efron and two co-partners out of the partnership "early in its existence so that the remaining partners could reap greater profits through the self-interested operation" of the project. (App. 15) While the Court acknowledged that the complaint also referred to a general goal of obtaining from the victim partners additional monies through capital calls, it chose to characterize that, not as a long term objective, but as a step towards the ultimate goal of taking unrestricted control of the enterprise.

In reaching its conclusion, the Court of Appeals expressed agreement with a view expressed by the Seventh Circuit: that Congress did not intend RICO to reach "garden-variety fraud," which is frequently accomplished through a series of wire or mail fraud acts over a period of time.

> Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented

> criminal sanctions dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time. ... [W]e think it unlikely that Congress intended RICO to apply in the absence of a more significant societal threat.

(App. 16-17, quoting United States Textiles, Inc. v. Anheuser-Busch Co., 911 F.2d 1261, 1268 (7th Cir. 1990).

The Court concluded:

> In sum, while the complaint pleads a series of related racketeering acts and permits an inference that defendants defrauded appellant and two of his partners, we agree with the district court's determination that no reasonable jury could find that these allegations establish a RICO "pattern." Taken together, the acts as alleged comprise a single effort, over a finite period of time, to wrest control of a particular partnership from a limited number of its partners. This cannot be a RICO violation.

(App. 17)

REASONS FOR GRANTING THE WRIT

This case presents an important and intriguing question: whether there are different standards for assessing whether, on the one hand, a complaint states a cause of action for civil RICO and, on the other, whether a criminal RICO violation has been sufficiently alleged. This Court has never held that elements that are common to both civil and criminal RICO have different meanings when applied in those two spheres, and has suggested that that is not the case. See G.R. Blakely, "Civil and Criminal RICO: An Overview of the Statute and Its Operations," 64 Def. Counsel J. 36, 37 (1997). But this Court has also noted that

"there are significant differences between civil and criminal RICO actions," Klehr v. A.O. Smith Corp., 521 U.S. 179, 188 (1997), and, at least in a de facto sense, the courts continue to treat civil and criminal RICO actions differently when there is a challenge to the sufficiency of the complaint or the indictment.

Thus, in the First Circuit, a RICO indictment is sufficient if it tracks the language of the RICO statute, sets forth the elements of the offense, fairly informs the defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecution. United States v. McDonough, 959 F.2d 1137, 1140-41 (1st Cir. 1992). Continuity is not an element of the offense, and need not be pled in an indictment. See United States v. Boylan, 898 F.2d 230, 250 (1st Cir.), cert. denied, 498 U.S. 849 (1990); United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir.), cert. denied, 525 U.S. 949 (1998) (indictment sufficiently alleged continuity of predicate acts where it alleged just two acts of mail fraud in connection with a scheme to defraud, reversing district court's dismissal of RICO count, "although continuity is an element of proof necessary at trial to conclusively establish Ferrarini's pattern of racketeering a charity . . . it is not an essential element of a RICO offense that must be clearly and specifically established in the indictment); United States v. Nabors, 45 F.3d 238 (8th Cir. 1998) ("The racketeering count alleges at least 15 different illegal acts committed over a seven-month period . . . As we have indicated above, it is up to the government to prove at trial that those alleged acts amounted to more than sporadic crime. That proof, however, need not be offered until trial.").

In the Petitioner's case, the complaint alleged, among other things, that the defendants had committed a minimum of 17 acts of mail and wire fraud over a period of at least 21 months in connection with a continuing and multi-faceted scheme to defraud both the plaintiff and others. Had these allegations been contained in an indictment, there is no doubt that it would have withstood a motion to dismiss under Fed. R. Crim. Pro. 7(c)(1). Compare United States v. Pelullo, 964 F.2d 193 (3rd Cir. 1992)

(acts of mail fraud spanning 19 months; RICO count remanded for retrial); United States v. Stodola, 953 F.2d 266 (7th Cir.), cert. denied, 506 U.S. 834 (1992) (17 predicate acts of bribery over 20 months, RICO conviction affirmed).

One district judge within the First Circuit has squarely held that different standards do apply in assessing civil and criminal pleadings, concluding that, in civil cases, it is appropriate "to look beyond the facial validity of the complaint to determine if a pattern of racketeering activities could reasonably be claimed." United States v. Mavroules, 819 F.Supp. 1109, 1110 n.1 (D. Mass. 1993). The court explained:

> there are endemic safeguards in the criminal system against baseless RICO charges, namely the filters of the grand jury and the prosecutor's office. To a large degree their protections insure that criminal RICO charges have some reasonable factual foundation. Thus, where a criminal RICO count is properly pled in the indictment, as here, there is generally no basis for this court to explore further the sufficiency of the evidence that underlies that count. Moreover, respect for the proper separation of powers between the executive and judicial branches of government cautions us against testing the factual basis for indictments, except in instances of glaring abuse.

Most courts, however, are not so forthright in explaining the difference in treatment between civil and criminal RICO actions. One result is substantial confusion, distortion and uncertainty in the law, as the courts treat the pattern requirement differently in criminal and civil cases, but without acknowledging openly that is what they are doing. In this case, the First Circuit acknowledged the lack of coherence in the law when it wrote that "the cases in this volatile field . . . cannot all be reconciled." (App. 13)

No common test for assessing the sufficiency of the pattern allegations even in civil cases has emerged. In evaluating closed-ended continuity after H.J., Inc., some cases, while claiming to eschew a bright-line test of minimum duration, hold that activity less than one year cannot be sufficient. See Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229, 244 (2d Cir. 1999) (predicate acts spanning less than one year insufficient); Wisdom v. First Midwest Bank of Poplar Bluff, 167 F.3d 402, 407 (8th Cir. 1999) (ten months too short). Others, in assessing closed-ended continuity, apply a "multi-factor" test under which duration is a primary factor, but not the only factor considered in assessing continuity. See, e.g., Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1022, 1024 (7th Cir. 1992) (duration "is perhaps the closest thing we have to a bright line continuity test"). Some courts utilizing a "multi-factor" analysis do so only when duration itself does not clearly establish continuity, see Tabas v. Tabas, 47 F.3d 1280, 1296 (3d Cir. 1994), cert. denied, 515 U.S. 1118 (1995). And even when a multi-factor analysis is used, different courts consider different factors, including, but not limited to "type of acts," "number of perpetrators," "number of victims," presence of "separate" or "multiple" schemes, scheme's "complexity," "number" and "variety" of predicate acts, number of "objectives," and occurrence of "distinct injuries." See, e.g., GICC Capital Corp. v. Technology Fin. Group, Inc., 67 F.3d 463, 467-68 (2d Cir. 1995), cert. denied, 518 U.S. 1017 (1996); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986); Barticheck v. Fidelity Union Bank, 832 F.2d 36, 38 (3rd Cir. 1987); Skylon Corp. v. Guilford Mills, Inc., 1997 WL 88894 (S.D.NY. 1997). Some of these factors such as "type of acts," "number of perpetrators," "number of victims," and "character of the goal," are arguably irrelevant to assessment of closed-ended continuity, which is, after all, "centrally a temporal concept." H.J. Inc., 492 U.S. at 242. They reintroduce, through the back door, a normative notion of societal threat akin to the racketeering injury requirement which was rejected in Sedima.

In the concurring opinion in H.J., Inc., 492 U.S. 229, 251, 254 (1989), Justice Scalia, in an opinion joined by the Chief Justice, Justice O'Connor, and Justice Kennedy, worried that the majority's tests for determining whether a "pattern of racketeering activity" existed were unclear, and that the lack of any clear or workable standards was "intolerable" since RICO not only federalized broad areas of state common law fraud, but has criminal applications, and thus must "even in its civil application, possess the degree of certainty required for criminal laws." Id. at 255. At least in the civil sphere, those concerns have proved well founded.

At the same time, in the criminal context, the courts have universally accepted Congress's mandate that RICO's provisions "be liberally construed to effectuate its remedial purposes," § 904, Pub. L. 91-452. They have done so notwithstanding the apparent conflict between that rule of construction and the established rule of lenity. See generally D. Kurzweil, Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause, 30 Colum. J.L. & Soc. Probs. 41 (1996). In criminal cases, the courts have not viewed either the pattern requirement or its continuity component as a serious restriction on the law's reach. Indeed, in criminal prosecutions, the courts routinely reject defendant's challenges to RICO indictments that, insofar as pattern goes, allege no more than that the defendant committed two or more racketeering acts. See, e.g., United States v. Palumbo Brothers, Inc., supra; United States v. Nabors, supra; United States v. McDonough, 959 F.2d 1137 (1st Cir. 1992) (RICO count alleging eight acts of bribery sufficient "more than suffices"); United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (six instances of wire fraud as part of one scheme against a single victim satisfied the statute's requirements). See also United States v. Gangi, No. 99-1675 (2d Cir. May 17, 2000) (RICO conviction upheld; predicate acts of securities and wire fraud in connection with the manipulation of the price of a particular stock, committed over a four-month period, supported open-ended continuity because jury could infer that there was a threat of long-term criminal activity).

If there is to be any difference in the legal test for continuity, or in its application, the difference must run in favor of the criminal defendant, not the civil one. The present upside-down state of the case law is itself good and sufficient reason for granting review in this case.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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December 26, 2000
New York, New York

APPENDIX

DAVID EFRON, INDIVIDUALLY, AS A CLASS A SPECIAL PARTNER OF ES HOTEL ISLA VERDE, S.E., A PUERTO RICO CIVIL PARTNERSHIP, AND FOR AND ON BEHALF OF THAT PARTNERSHIP,

Plaintiff, Appellant,

v.

EMBASSY SUITES (PUERTO RICO), INC., EMBASSY SUITES (ISLA VERDE), INC., PROMUS HOTEL CORPORATION, MORA DEVELOPMENT CORPORATION, FIRST BIG ISLAND STEAKHOUSE, INC., CLEOFE RUBI GONZALEZ, MORAIMA CINTRON DE RUBI, EMMA M. CANCIO-SANTOS, E.S. HOTEL ISLA VERDE, S.E., CORPORACION DE DESARROLLO HOTELERO, AND FUNDACION SEGARRA BOERMAN E HIJOS, INC.,

Defendants, Appellees.

No. 99-1679

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

223 F.3d 12; 2000 U.S. App. LEXIS 19965

August 14, 2000, Decided

JUDGES: Before Selya, Circuit Judge, Coffin, Senior Circuit Judge, and Boudin, Circuit Judge.

OPINIONBY: COFFIN

OPINION: COFFIN, Senior Circuit Judge. Plaintiff-appellant David Efron, a member of a limited partnership formed to

build and operate an Embassy Suites hotel in Puerto Rico, claims that several of his partners intentionally caused the project to experience financial difficulties in a scheme to extract additional money from him and other investors and, ultimately, to squeeze down the value of Efron's substantial interest in the partnership. Efron brought a civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. @ 1962(c), (d), and Puerto Rico law. Concluding that the allegations in the complaint did not show RICO violations, the court dismissed the federal claims and declined to exercise supplemental jurisdiction over the Commonwealth claims. See Efron v. Embassy Suites (Puerto Rico), Inc., 47 F. Supp. 2d 200 (D.P.R. 1999). We affirm, agreeing with the district court that appellant has failed to adequately allege a "pattern of racketeering activity," see 18 U.S.C. @ 1962(c), but adding elaboration to its rationale.

I. Factual Background

We narrate the allegations contained in the complaint and RICO case statement in the light most favorable to appellant. See Feinstein v. Resolution Trust Corp., 942 F.2d 34, 37 (1st Cir. 1991). Efron and his associates formed the ES Hotel Isla Verde, S.E. Partnership ("the Partnership") in 1995 to develop and operate an Embassy Suites hotel and casino in the Carolina section of San Juan, Puerto Rico. Efron contributed approximately $5 million in property and cash, receiving in return twenty-two percent of the equity in the project. Of the six other partners, four are defendants in this case: Cleofe Rubi Gonzalez ("Rubi"); his wife, Moraima Cintron de Rubi ("Cintron"); Mora Development Corporation ("MDC"), a company owned by Rubi; and Embassy Suites Isla Verde, Inc. ("ESIV"). Two other partners are described as co-victims, although they did not join Efron's suit: Corporacion De Desarollo Hotelero ("CDH"), a public corporation that is a subsidiary of Puerto Rico's Department of Tourism; and Fundacion Segarra Boerman e Hijos ("FSBH"). Also named as defendants were several corporations affiliated with the

defendant partners, including Embassy Suites (Puerto Rico), Inc. ("ESPR"), a company hired by the Partnership to manage the hotel, and First Big Island Steakhouse, Inc., a Rubi-controlled company that leased space from the Partnership for a restaurant ("Outback"). Emma Cancio Santos, an attorney for ESIV and Rubi, also was named as a defendant.

Efron alleges that the defendants deliberately caused the hotel project to lose money by generating excessive construction costs, engaging in sweetheart leases with the on-site restaurant and gift shop, overpricing rooms, and performing other acts of mismanagement. According to the complaint, ESPR purposefully created artificial cash shortfalls, which under the Partnership agreement could be covered by capital calls to the limited partners. The agreement specified that a partner who did not provide the requested capital could have his interest reduced proportionately. Efron alleges that, to protect his initial investment and avoid losing his equity, he was forced to invest an additional $ 1 million in response to such capital calls.[1]

Efron filed suit in October 1997. The amended complaint identified seventeen instances of alleged mail or wire fraud during a twenty-one-month period as the unlawful acts

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[1] The complaint elaborated on the improper practices as follows: the cost overruns allegedly resulted from (1) payments to a Rubi-owned company in excess of the value of goods and services received; (2) subcontractor bills from other Rubi projects that were shifted onto the Partnership, and (3) construction delays from the late addition to the project of the Outback restaurant. Cash shortfalls continued to build after the hotel was completed because the defendants allegedly overpriced rooms and failed to adequately market the hotel's services. In addition, the lease arrangement with Outback allegedly benefited Rubi to the detriment of the Partnership, and the lease to the hotel's gift shop allegedly was below market value.

supporting a RICO claim, the first of which was a letter sent to the partners by Rubi on January 11, 1996, stating that the project was experiencing cost overruns of about $ 7 million. The subsequent letters fall into two general categories: (1) communications that relate to the project's cost overruns and possible solutions, namely, capital contributions from the partners and refinancing, and (2) communications that concern appellant's efforts to review the Partnership books and obtain information about the restaurant and other lease arrangements.

In addition to the substantive RICO claim, see 18 U.S.C. @ 1962 (c), the amended complaint asserted a RICO conspiracy cause of action, see 18 U.S.C. @ 1962(d), as well as claims under Commonwealth law for fraud, breach of contract, breach of fiduciary duty, and violation of the Puerto Rico RICO act.

The district court rejected defendants' argument that the amended complaint lacked the particularity required for fraud claims under Fed. R. Civ. P. 9(b), but it concluded that appellant had not adequately alleged a pattern of racketeering activity. It alternatively ruled that Efron lacked standing to bring the RICO claims either individually or derivatively on behalf of the Partnership. Having dismissed the federal RICO claims, the court declined to exercise supplemental jurisdiction to hear the Commonwealth law claims. On appeal, Efron contends that the court improperly viewed the alleged facts and inferences in the defendants' favor, leading it to conclude wrongly that he had failed to establish the elements of a RICO violation and conspiracy. He further maintains that the amended complaint demonstrates his standing, both individually for his unique damages and derivatively for the Partnership.

We turn now to the issue which we deem dispositive - whether the amended complaint described a "pattern" of racketeering activity. We first sketch the general principles governing RICO claims and then evaluate appellant's specific contentions in light of those standards.

II. Discussion

To state a RICO claim under section 1962(c), a plaintiff must allege each of the four elements required by the statute: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" Feinstein, 942 F.2d at 41 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)).[2] This case centers on whether Efron alleged sufficient facts to support a jury finding of a "pattern," there being no dispute that the complaint adequately alleged the other components of a RICO violation. By statute, the "pattern" element requires a plaintiff to show at least two predicate acts of "racketeering activity," which is defined to include violations of specified federal laws, such as the mail and wire fraud statutes, see 18 U.S.C. @ 1961(1)(B), (5). Although showing two predicate acts is the only statutory requirement, case law establishes that this is not sufficient to prove a "pattern" - the plaintiff also must demonstrate that the "predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989); see also Feinstein, 942 F.2d at 44.

We have more than once remarked upon the difficulty of articulating concrete guidelines for this "continuity plus relationship" standard for identifying a pattern. See Schultz v. Rhode Island Hosp. Trust Nat'l Bank, N.A., 94 F.3d 721, 731 (1st Cir. 1996); Apparel Art Int'l, Inc. v. Jacobson, 967 F.2d 720, 722 (1st Cir. 1992); see also H.J. Inc., 492 U.S. at 236

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[2] Section 1962(c) provides, in relevant part:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

("Developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task.").[3] The Supreme Court has noted that the "relationship" portion of the standard is easier to grasp, in part because there exists a relevant statutory definition in another portion of the legislation of which RICO was a part. See H.J. Inc., 492 U.S. at 240. Under Title X of the partially repealed Organized Crime Control Act of 1970, the pattern requirement was defined "solely in terms of the relationship of the defendant's criminal acts one to another: 'Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" Id. (quoting 18 U.S.C. @ 3575(e)). The parties do not dispute the relatedness of the communications at issue here.

The continuity element, which lacks statutory illumination, has proved more puzzling. Noting that it is "difficult to formulate in the abstract any general test for continuity," the Supreme Court in H.J. Inc. nonetheless provided a starting point for analysis. See 492 U.S. at 241-43; Feinstein, 942 F.2d at 45. We previously have summarized the court's guidance as follows: For there to be continuity, the plaintiff must show that the related predicates "amounted to, or posed a threat of, continued criminal activity." . . . Under the "amounting to" approach, "[a] party alleging a RICO violation may demonstrate continuity . . . by proving a series of related predicates extending over a substantial period of time." H.J., 492 U.S. at 242. Because RICO was intended by Congress to

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[3] The "continuity plus relationship" description was quoted by the Supreme Court in H.J. Inc. from the legislative history of the RICO statute. See 492 U.S. at 239 (quoting 116 Cong. Rec. 18940 (1970)). Justice Scalia in a concurrence in H.J. Inc. termed that formulation "about as helpful . . . as 'life is a fountain.'" Id. at 252 (Scalia, J., concurring).

apply only to enduring criminal conduct, "predicate acts extending over a few weeks or months . . . do not satisfy this requirement." Id. Under the "threat" approach, however, even where the predicate acts occur in a narrow time frame and suit is brought before the pattern has taken definitive shape, the requirement can still be satisfied by . . . a showing that "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future [or] . . . are part of an ongoing entity's regular way of doing business." Id. Feinstein, 942 F.2d at 45 (some citations omitted).

The Supreme Court thus described continuity as "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." H.J. Inc., 492 U.S. at 241. The Justices also explained in H.J. Inc. that showing a "pattern" does not necessarily require proof of multiple criminal "schemes." Finding that the "multiple-scheme" prerequisite "brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of 'continuity' itself," id. at 240-41, the Court emphasized instead the temporal focus of the "continuity" requirement. Thus, one scheme that extends over a substantial period of time, or that shows signs of extending indefinitely into the future, can establish a pattern.

In this case, the district court ruled that the allegations in appellant's complaint failed to establish either type of continuity. After trimming the number of actionable letters and faxes to eight,[4] it held that "the acts are simply too few and the time period too short" to establish a closed period of

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[4] The court excluded seven faxes because Efron failed to allege that they had been transmitted interstate and eliminated two mailings as not in furtherance of the alleged scheme.

racketeering activity, see 47 F. Supp. 2d at 206,[5] and it concluded that there was no future threat of continuing mail and wire fraud to establish open-ended continuity. Rejecting appellant's contention that the defendants were engaged in a long-term, ongoing criminal enterprise, it characterized the conflict as a "bitter local law dispute between partners." Id. at 210 n.11.

Before we address the court's conclusion on the merits, we discuss two preliminary issues. Efron claims on appeal that the court erred in disregarding the faxes and refusing to consider all of the specified fraudulent mailings. He claims that, under New England Data Servs., Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987), he is entitled to an opportunity to particularize the alleged predicate acts to remedy their deficiencies regarding when and where the mail or wires were used before his complaint is dismissed. He extends this argument as well to his general allegation that, in addition to the seventeen specifically pleaded communications, there were "literally hundreds of acts" and a "myriad of mail and wire frauds." But in this case, the underlying rationale for relaxation of pleading requirements -that the needed information is likely to be in the exclusive control of the defendant, see id. at 290 - is absent. The gist of Efron's complaint is that he and his non-conspiring partners were defrauded by communications that were sent to them, and such communications would not be in defendants' sole control. Moreover, any need to flesh out allegations in the complaint should have been raised first through a renewed request to conduct discovery and a motion in the district court seeking leave to amend the complaint to cure the infirmities identified by that court. See Feinstein, 942 F.2d at 43-44. Nonetheless, while we consider only those predicate acts specifically alleged in evaluating the adequacy of appellant's

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[5] The court pointed out that, of the viable predicate acts, all but two occurred during a 90-day period from June to September 1997.

"pattern" allegations, see Fleet Credit Corp. v. Sion, 893 F.2d 441, 445 (1st Cir. 1990), we are reluctant in the context of an interstate business to exclude the faxes on the highly technical ground of appellant's failure to plead their interstate quality. We need not do so because including them will not change the outcome of our review.

A second preliminary issue merits comment. It is whether the pleadings sufficiently indicate that appellant's injuries were caused by the predicate acts of wire and mail fraud. That such a causal nexus must exist is well established. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266-68 & n.12, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992) (to state a RICO claim, plaintiff must show injury proximately caused by racketeering activity);Moore v. Painewebber, Inc., 189 F.3d 165, 172 (2d Cir. 1999) (plaintiffs must show that the defendants' misstatements were "the reason the transactions turned out to be . . . losing ones" (citation omitted)); Bonilla v. Volvo Car Corp., 150 F.3d 62, 66-67 (1st Cir. 1998) (RICO requires plaintiffs to show that they were "injured in [their] business or property by reason of" the racketeering activity); Miranda v. Ponce Fed. Bank, 948 F.2d 41, 44, 47 (1st Cir. 1991) (to avert dismissal under Rule 12(b)(6), civil RICO complaint must state facts showing "a causal nexus between [racketeering activity] and the harm alleged"; the "injury itself" must be "the result of a predicate act"); cf. Beck v. Prupis, 146 L. Ed. 2d 561, 120 S. Ct. 1608, 1617 (2000) (holding that the injury underlying a RICO conspiracy claim must be caused not by any overt act but by conduct that constitutes racketeering activity or is otherwise unlawful under the RICO statute).

On the facts, the lack of causation seems to be a significant possibility. Efron entered the partnership before any of the alleged predicate acts occurred, and thus without reliance on any misrepresentations. He asserts that he was coerced into paying $ 1 million beyond his original contribution to preserve his equity, but he does not allege that he was deceived by the

written requests for additional capital. Instead, he describes his "injury-in-fact" as the prospect of a squeezed-down equity position in the partnership, which would have been a by-product of his refusal to contribute all of the requested funds but not necessarily a loss occasioned by misrepresentations or false assurances. In his RICO case statement, Efron suggests that he was the only one of the three victim partners who was not deceived, asserting that the defendants "conducted their misdeeds under unsuspecting eyes, except for Efron." (Emphasis added.)

Despite this seeming weakness in appellant's RICO claim, we are disinclined to rest a judgment on a decision of the causation issue. It was alluded to in appellees' briefs only in a list of pleading requirements, and it was the subject of brief treatment by the parties at oral argument. It is conceivable that an extremely generous reading of the complaint might allow the inference that Efron contributed $ 1 million beyond his original investment in response to the defendants' written requests because he initially was deceived into believing there was a legitimate need for the funds. In any event, our disposition makes it unnecessary to explore further the question of whether the mailings caused a loss to appellant.

We therefore move to the merits and the issue of continuity, accepting for purposes of our discussion that all seventeen alleged acts of wire and mail fraud are viable predicate acts under the RICO statute. Although the twenty-one month time frame for these communications meets the Supreme Court's requirement for closed continuity of more than "a few weeks or months," H.J. Inc., 92 U.S. at 242, it is not so long a period nor are there so many predicate acts that other indicators of continuity - or the lack of them - are without significance. Cf. Fleet Credit Corp., 893 F.2d at 447 (finding that ninety-five fraudulent mailings over four and one-half years "is the type of 'long-term criminal conduct' defined by the [Supreme Court] as constituting 'continued criminal activity'"); United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992) ("Most

courts that have found continuity in a closed period did so in cases involving periods of several years.")[6]; Hindes v. Castle, 937 F.2d 868, 875 (3d Cir. 1991) (collecting cases ranging from a period of four and one-half to seventeen years).

The Supreme Court in H.J. Inc. noted Congress's "natural and commonsense approach to RICO's pattern element," see 492 U.S. at 237, suggesting that its discussion of temporal factors did not mean that other considerations were to be entirely ignored. Indeed, in rejecting the notion that a pattern of racketeering activity requires proof of multiple schemes, the Court noted that "proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity." Id. at 240. Likewise, where the racketeering activity exceeds in duration the "few weeks or months" that the Supreme Court in H.J. Inc. deemed inadequate, but is neither so extensive in reach nor so far beyond the minimum time period that common sense compels a conclusion of continuity, the fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims also strikes us as "highly relevant." Cf. Vicom, Inc. v. Harbridge Merchant Servs., 20 F.3d 771, 780 (7th Cir. 1994) (various factors considered in assessing continuity, including the number of victims, the presence of separate schemes, and the occurrence of distinct injuries); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543 (10th Cir. 1993) (considering, in addition to duration, "extensiveness" of the RICO scheme, including number of

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[6] Although the court in Pelullo concluded that 19 months was a sufficient period for a finding of continuity, see 964 F.2d at 209, it expressed some doubt that the facts established either open or closed continuity. See id. at 209 n.15, 210. It nonetheless remanded the case for retrial on the RICO count, as well as on multiple wire fraud counts whose reversal was based on evidentiary error.

victims, variety of racketeering acts, whether the injuries caused were distinct, and the complexity and size of the scheme); Pelullo, 964 F.2d at 208 ("We have eschewed the notion that continuity is solely a temporal concept, though duration remains the most significant factor.")[7]; United States Textiles, Inc. v. Anheuser-Busch Co., 911 F.2d 1261, 1269 (7th Cir. 1990) ("'It is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.'" (quoting Sutherland v. O'Malley, 882 F.2d 1196, 1204 (7th Cir. 1989)).

Having considered carefully the various factors here, we have concluded that the allegations do not demonstrate the kind of broad or ongoing criminal behavior at which the RICO statute was aimed. In essence, appellant alleges a scheme to diminish the value of the project in the short run, pressing plaintiff and two others to yield up their interests so that the schemers could own and control the whole project. Although multiple related acts of deception were claimed to underlay the faxes and mailings, all allegedly were aimed at the single goal of transforming the ownership of the Partnership during its early stages. See Amended Complaint, P 19 (defendants' goal was "to dilute the interests of the Special Partners and to siphon away Partnership assets" to gain "outright control of the Partnership"). The three named victims were not separately targeted through repetitions of criminal conduct, which could have reflected persistent or broad-based crime; their injury instead resulted from a single set of alleged misdeeds and occurred at the same time.

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[7] The Third Circuit, en banc, later discussed the continuity requirement at length in a series of opinions. See Tabas v. Tabas, 47 F.3d 1280 (3d Cir. 1995) (en banc). The majority adhered to the view that multiple factors may be relevant in evaluating continuity.

This narrow attack on three partners' participation in a particular business venture is qualitatively different from the single scheme underlying H.J. Inc. The plaintiffs there had alleged that telephone company officials and others had engaged in multiple acts of bribery over at least a six-year period to obtain approval for unfairly and unreasonably high rates. 492 U.S. at 250. Thousands of telephone company customers presumably were injured by the ongoing scheme.

Although a RICO pattern need not have countless victims, the finite nature of the racketeering activities alleged here, together with their occurrence over a relatively modest period of time, cannot, in our view, support a jury finding of a RICO pattern under the "closed" continuity approach. Our own precedent firmly rejects RICO liability where "the alleged racketeering acts . . .,'taken together, . . . comprise a single effort' to facilitate a single financial endeavor," Schultz, 94 F.3d at 732; see also Apparel Art, 967 F.2d at 723 ("[A] single criminal episode, or event, is not a 'pattern' . . . [because] its parts, taken together, do not 'amount to or pose a threat of continued criminal activity.'") (quoting H.J. Inc., 492 U.S. at 239).[8] And, while the cases in this volatile field understandably cannot all be reconciled, we find ourselves in good company. See, e.g., Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1265 (D.C. Cir. 1995) (combination of "single scheme, single injury, and few victims . . . makes it virtually impossible for plaintiffs to state a RICO claim");[9] Stone, 998 F.2d at 1545

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[8] In Apparel Art, then Chief Judge Breyer noted that the court deliberately used "a vague term like 'episode'" to distinguish the concept of an isolated occurrence from the technical concept of a scheme, as used by the Supreme Court in H.J. Inc. See 967 F.2d at 722.

[9] In Alban Towers, the court noted that "the number of alleged predicate acts (fifteen), and the most generous estimate

("Where the scheme has a limited purpose, most courts have found no continuity."); Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1516 (10th Cir. 1990) (affirming dismissal of RICO claim where a "closed-ended series of predicate acts . . . constituted a single scheme to accomplish 'one discrete goal,' directed at one individual with no potential to extend to other persons or entities" (citation omitted)); Menasco, Inc. v. Wasserman, 886 F.2d 681, 684 (4th Cir. 1989) ("Defendants' actions were narrowly directed towards a single fraudulent goal.").

Nor is it reasonable to infer from the allegations here that there is a risk of a broader scheme, or that the fraudulent acts directed at appellant would continue indefinitely into the future, either of which might support a conclusion of "open-ended" continuity. There is nothing to suggest that the defendants would seek to repeat their fraud in other partnerships or similar business settings, or to employ mail and wire fraud indefinitely in the Embassy Suites partnership, thereby showing that racketeering activity might be a "regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise,'" H.J. Inc., 492 U.S. at 243; cf. Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987) ("no suggestion that defendants used similar means to obtain other subcontracts, or that they bribed anyone else").

Viewing the Partnership as either the RICO enterprise or defendants' "ongoing legitimate business," the scenario painted by Efron's pleadings does not threaten the "long-term criminal conduct" with which Congress was concerned, see H.J. Inc., 492 U.S. at 242. Almost by definition, the alleged fraud had a limited life expectancy. The scheme's objective, as reasonably

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of the length of time the acts continued (three years . . .), are not enough to overwhelm the three narrowing factors." 48 F.3d at 1265.

understood from Efron's not fully consistent allegations,[10] was to squeeze appellant and two co-partners out of the partnership early in its existence so that the remaining partners could reap greater profits through the self-interested operation of this hotel and their other businesses. See Vicom, Inc., 20 F.3d at 782 ("Schemes which have a clear and terminable goal have a natural ending point . . . [and] therefore cannot support a

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[10] In paragraph 19 of the amended complaint and on page 6 of the RICO case statement, for example, Efron describes the defendants' goal to be "gaining outright control of the Partnership." In paragraph 22 of the amended complaint, he alleges that MDC and Rubi made "continual capital calls either to defraud the Special Partners of more money or, alternatively, to try to 'squeeze down' their interests in the Partnership." (Emphasis added.) Paragraph 41, section a, described the first alleged predicate act as a letter sent by Rubi to the special partners concerning cost overruns. Efron alleges: "This was the implementation, carrying out, and continuation of the previously designed scheme to defraud Efron out of additional monies or alternatively to dilute his interest and to deprive him of the full realization of his investment, or all of these." In section r of that paragraph, at the conclusion of the full list of predicate acts, he asserts: "All of the noted predicate acts were meant to defraud, misrepresent, mislead, and to deprive the Special Partners, including Efron, of their ownership interest in the Partnership."

Thus, although the amended complaint and RICO case statement refer to a general goal to defraud Efron and the other victim partners of "more money," the amended complaint read as a whole does not depict this as a long-term objective but simply as a necessary step toward defendants' specific goal of "taking unrestricted control of the enterprise." See RICO case statement at 7. His brief and oral argument were framed similarly. See, e.g., Brief at 27 ("By their nature, the [defendants'] goals will not be reached, at least until such time as plaintiff loses his entire interest in the partnership.").

finding of any specific threat of continuity that would constitute open-ended continuity.").

It is true that the scheme as alleged already had spanned twenty-one months, and that its exact endpoint could not be ascertained from the pleadings because it depended upon Efron's and the other victim partners' refusal to respond to capital calls large enough to result in squeezing down their interests in the Partnership. This is far different, however, from the open-ended continuity illustrated by the single scheme described in H.J. Inc., an endeavor that apparently would have gone on without end had it not been detected. See 492 U.S. at 250. Had Efron argued that the defendants planned to operate the hotel indefinitely at a paper loss as a means of perpetually defrauding him, rather than asserting the specific objective of squeezing him out of the Partnership, he would have a stronger argument for an open-ended RICO pattern. His pleadings and argument, however, depict an undertaking with a soon-to-be reached endpoint. Indeed, Efron's refusal to contribute any more funds and his decision to file suit to protect his interest suggest that the objective was virtually accomplished.

We note that courts, including our own, have suggested that RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it. See, e.g., Schultz, 94 F.3d at 732; Roeder, 814 F.2d at 31. The Seventh Circuit has been explicit in cautioning against finding continuity too easily in the context of a single dishonest undertaking involving mail or wire fraud: Virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are "related" by purpose and spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions [under RICO] dependent solely on whether the fraudulent scheme is well enough

conceived to enjoy prompt success or requires pursuit for an extended period of time. Given its "natural and common sense approach to RICO's pattern element," we think it unlikely that Congress intended RICO to apply in the absence of a more significant societal threat.

United States Textiles, Inc., 911 F.2d at 1268 (quoting Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593, 597 (3d Cir. 1990)[11]); cf. Tabas v. Tabas, 47 F.3d 1280, 1290 (3d Cir. 1995) (en banc) ("The inclusion within the scope of civil RICO of [mail and wire fraud], more prevalent in the commercial world than in the world of racketeers, has caused concern that RICO sweeps too broad a swathe."); Menasco, 886 F.2d at 683 ("Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences. . . . The pattern requirement . . . ensures that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value . . . .").

In sum, while the complaint pleads a series of related racketeering acts and permits an inference that defendants defrauded appellant and two of his partners, we agree with the district court's determination that no reasonable jury could find that these allegations establish a RICO "pattern." Taken together, the acts as alleged comprise a single effort, over a finite period of time, to wrest control of a particular partnership from a limited number of its partners. This cannot be a RICO violation.

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[11] In Tabas, 47 F.3d at 1293 n.17, the Third Circuit noted that, to the extent Marshall-Silver could be read to require the existence of a "societal threat" to establish RICO continuity, it is overruled. We deem this narrowing of Marshall-Silver unimportant for present purposes.

III. Other issues

Our conclusion that appellant has failed to adequately plead a substantive violation of RICO makes it unnecessary for us to consider his other claims of error. Questions concerning his standing obviously are moot. In addition, his conspiracy claim is without merit. A conspiracy claim under section 1962(d) may survive a factfinder's conclusion that there is insufficient evidence to prove a RICO violation, Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000), petition for cert. filed, 68 U.S.L.W. 3003 (U.S. June 27, 2000) (No. 99-2089), but if the pleadings do not state a substantive RICO claim upon which relief may be granted, then the conspiracy claim also fails, id.; see also Salinas v. United States, 522 U.S. 52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense . . . .").

The judgment of the district court is therefore affirmed.

DAVID EFRON, Plaintiff, v. EMBASSY SUITES (PUERTO RICO), INC., et al., Defendants.

Civil No. 97-2547 (HL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

47 F. Supp. 2d 200; 1999 U.S. Dist. LEXIS 6729

April 14, 1999, Decided

JUDGES: HECTOR M. LAFFITTE, United States District Judge.

OPINIONBY: HECTOR M. LAFFITTE

OPINION: OPINION AND ORDER

Before the Court are the motions of several defendants to dismiss the nine-count first amended complaint and the plaintiff's response thereto. Dkt. Nos. 43, 56, 58, 60 For the reasons discussed in this opinion, the motions are granted.

BACKGROUND[1]

This lawsuit involves a limited partnership in which plaintiff invested. The partnership, known as E.S. Hotel Isla Verde, S.E. [the "Partnership"], was organized for the purpose of developing and operating an Embassy Suites Hotel in Carolina, Puerto Rico. The partnership was formed under the

[1] All facts are taken from plaintiff's amended complaint filed on December 17, 1997 and from plaintiff's RICO case statement, Dkt. No. 23.

laws of Puerto Rico between plaintiff and the following parties: Cleofe Rubi Gonzalez ["Rubi"] and his wife Moraima Cintron de Rubi ["Cintron"]; Mora Development Corporation ["MDC"]; Embassy Suites (Isla Verde), Inc. ["ESIV"]; Corporacion De Desarrollo Hotelero ["CDH"]; and Fundacion Segarra Boerman E Hijos, Inc. ["FSBH"]. All partners were "special" or limited partners under Puerto Rico law.[2] MDC, a corporation headed by Rubi, was designated managing partner and given the concomitant authority to conduct administrative duties on behalf of the Partnership. Plaintiff alleges that the Partnership is a legitimate business entity that is being used as an enterprise to conduct an unlawful racketeering scheme.

In general, plaintiff alleges that limited partners ESIV, MDC, Rubi, and Cintron have joined with other defendants in an effort to bilk the Partnership of funds. The other defendants are: Embassy Suites (Puerto Rico), Inc. ["ESPR"], a Delaware corporation hired by the Partnership to manage the hotel; another Delaware corporation identified only as Promus, the parent corporation of ESPR and ESIV; First Big Island Steakhouse, Inc. ["Outback"], a Rubi-controlled corporation leasing restaurant space from the Partnership; Emma M. Cancio Santos ["Cancio"], attorney-in-fact for the Partnership and agent for several of the defendants.

Specifically, the alleged scheme plays out as described below. Rubi, as president of managing partner MDC, conspired with Promus and ESIV to hire ESPR to manage the Partnership property. ESPR intentionally caused the hotel to under-perform by incurring in construction overruns, overpricing rooms, engaging in sweetheart leases, and other acts of mismanagement. According to the complaint, ESPR acted purposefully in order to create cash shortfalls which would have to be covered by capital calls to the limited partners. A limited partner who failed to provide the required

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[2] 31 L.P.R.A. § 4372.

capital would then have its interest in the Partnership reduced proportionally.

In more detail, the conspirators allegedly caused construction cost overruns by: making payments to a Rubi-owned company in excess of the value of goods and services received, shifting subcontractor bills from other projects onto the Partnership, and delaying construction by adding plans for a specialty restaurant, Outback, late in the construction phase. After the hotel was built, the conspirators allegedly overpriced the rooms and failed to adequately market the hotel's services to create cash shortfalls. Additionally, the conspirators caused the Partnership to engage in a sweetheart lease deal with Outback to the benefit of Rubi and ESPR and to the detriment of the Partnership. The conspirators executed another lease to the hotel's gift shop that was below market value. Finally, MDC and Rubi allegedly sought to prevent plaintiff from reviewing the Partnership's records in an effort to cover up their scheme.

By all of these activities, and the predicate acts of mail and wire fraud attached to them, the amended complaint charges that the defendants violated The Racketeer influenced and Corrupt Organizations Act ["RICO"], 18 U.S.C. § 1962(c), (d). Defendants have moved to dismiss the complaint and have raised several grounds for doing so, including: (1) the complaint's failure to states a claim for RICO violations due to lack of a pattern; (2) plaintiff's lack of standing; (3) the complaint's failure to meet the heightened pleading requirements imposed by Fed. R. Civ. P. 9(b); and (4) lack of supplemental jurisdiction over the local law claims.

ANALYSIS

I. Rule 9(b) Particularity

Rule 9(b) requires plaintiffs to plead the circumstances of alleged fraud with particularity. This heightened pleading requirement extends also to the pleading of RICO mail and

wire fraud allegations as in the case at bar. New England Data Services v. Becher, 829 F.2d 286 (1st Cir. 1987). The purpose of Rule 9(b)'s particularity requirement are threefold; (1) to place defendants on notice and allow them to prepare a meaningful response, (2) to preclude the use of groundless fraud claims as pretext for discovery or "strike suits", and (3) to safeguard defendants from the reputation damage of frivolous charges. Id. at 289. In this case, plaintiff has filed a RICO Case Statement, Dkt. No. 23, pursuant to an order of the Court. In that case statement, and also in the complaint, plaintiff has briefly set forth the dates, contents, and circumstances surrounding each alleged incident of mail or wire fraud. These detailed summaries, rather than general accusatory language, adequately serves to place defendants on notice of which conduct is at issue and to assure the Court that the charges are not of wholly spurious character. As such, the Court finds that plaintiff has satisfied the particularity requirement of 9(b).

II. Violation § 1962

Plaintiff's RICO claim is brought under 18 U.S.C. § 1962(c) and (d). Plaintiffs allege that all of the defendants violated the RICO act by participation in the purported scheme to siphon money away from the Partnership and squeeze out the interests of the limited partners who refused to make capital contributions. To plead a violation of § 1962(c), plaintiffs must allege the defendants' conduct of an enterprise through a pattern of racketeering activity. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Plaintiffs have not sufficiently pleaded the predicate acts necessary to show a pattern of racketeering, and their RICO claims must be dismissed accordingly.

A. Inadequacy of the Alleged Pattern of Racketeering

A RICO plaintiff needs to allege at least two predicate acts of racketeering within a 10-year period.18 U.S.C. § 1961(5)

The predicate acts must consist of offenses indictable under specifically listed criminal statutes, including, mail fraud,18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. 18 U.S.C. §§ 1961(1)(A), 1961(1)(D). Additionally, the plaintiff must show that the predicate acts are related, and that they amount to or pose a threat of continued criminal activity. H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 2900-01, 106 L. Ed. 2d 195 (1989).

1. Predicate Acts

The Court looks to plaintiff's RICO case statement, Dkt. No. 23 pp. 16-21, wherein plaintiff set forth his allegations regarding predicate activity. The RICO case statement contains allegations of mail fraud and wire fraud as the predicate acts, and the question is whether those allegations are sufficient to provide a basis for the RICO claims. The allegations can only be predicate acts if they are indictable under the respective criminal statutes. 18 U.S.C. § 1961(1)(B). Plaintiff has alleged several facsimile transmissions in an effort to show that wire fraud was committed. However, none of these facsimile transmissions are alleged to have traveled on interstate phone lines, a necessary component of the actus reus needed for indictment under the wire fraud statute. 18 U.S.C. § 1343.Bernstein v. Misk, 948 F. Supp. 228 (E.D.N.Y. 1997); Brooke v. Schlesinger, 898 F. Supp. 1076 (S.D.N.Y. 1995)(disallowing wire fraud allegations as RICO predicate acts because there was no interstate telephone use); H.G. Gallimore, Inc. v. Abdula, 652 F. Supp. 437 (N.D.Ill. 1987)(telephone fraud is not racketeering activity under RICO unless interstate communication alleged sufficient for indictment under wire fraud statute); Harris Trust and Sav. Bank v. Ellis, 609 F. Supp. 1118 (N.D.Ill.), aff'd, 810 F.2d 700 (1985)(wire fraud allegations deficient where they did not allege use of interstate wires and all parties were Illinois residents). Because plaintiff has not alleged that any of the facsimile transmissions went outside of Puerto Rico, the allegations concern only intrastate telephone communications

unreachable by the statute. As such, all of the wire fraud allegations must be discounted as RICO predicate acts as a matter of law.

The remaining ten allegations consist of letters sent over a period of less than two years. Plaintiff claims that these letters were in furtherance of the scheme to defraud him of money or his interest in the Partnership, and so they must have been to qualify as indictable under the mail fraud statute. 18 U.S.C. § 1341; United States v. Allard, 926 F.2d 1237 (1st Cir. 1991) (scheme is an essential element of a crime under § 1341). However, a few of plaintiffs allegations do not meet this requirement. For example, plaintiff alleges that Cancio, on behalf of First Big Island Steakhouse, Inc. sent a letter to Outback Steakhouse International that Cancio, Rubi, and Rubi's family would receive complimentary dining cards for the restaurant. Plaintiffs allege that this letter demonstrates the defendants' self-interest in operating the restaurant and the Partnership's managing partner. Pl.'s RICO Stmt, Dkt. No. 23, p. 17. Even if this letter demonstrates plaintiff's contention, it still fails to advance defendants' scheme of depriving plaintiff and the Partnership of money. Even viewed in the light most favorable to plaintiff, it is not an indictable offense under § 1341 and cannot be part of the Court's analysis of predicate acts.

Similarly, plaintiff alleges that Cancio sent letters to the special partners and an outside accountant indicating that certain partnership records were being made available to plaintiff and the accountant for review and that other documents had already been provided. Plaintiff claims that the defendant did not make the stated documents available in any meaningful way and that the letter "was an attempt to divert attention from the defendant's misconduct by falsely stating that they were complying with [plaintiff's] requests." Pl.'s RICO Stmt., Dkt. No. 23, pp. 20-21. Again, even in the light most favorable to defendants, these letters could not have advanced the alleged scheme by general allegations that the

letters were an attempt to "divert attention."

2. Relatedness and Continuity

A plaintiff seeking to establish a RICO "pattern of racketeering" must show that the predicate acts are related and that they amount to or pose a threat of continued criminal activity. H.J., Inc., 492 U.S. at 238; Ahmed v. Rosenblatt, 118 F.3d 886, 889 (1st Cir. 1997); Libertad v. Welch, 53 F.3d 428, 445 (1st Cir. 1995); Feinstein v. Resolution Trust Corp., 942 F.2d 34, 44 (1st Cir. 1991). Continuity, for RICO purposes, is both "a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat or repetition." Vicom Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 779 (7th Cir. 1994)(quoting H.J., Inc., 492 U.S. at 241). See also, Fleet Credit Corp. v. Sion, 893 F.2d 441, 445-48 (1st Cir. 1990)(detailed examination of continuity requirement in light of Supreme Court's ruling in H.J., Inc.).

The First Circuit has determined that common sense rather than any strict test rules a determination of continuity; however, it has stressed that in light of H.J., Inc. the number of acts and the length of the period over which they occurred are central to the analysis. United States v. Boylan, 898 F.2d 230, 250 (1st Cir. 1990); Lincoln House, Inc. v. Dupre, 903 F.2d 845, 846 (1st Cir. 1990); Fleet Credit Corp., 893 F.2d at 447. Accordingly, the Court shall primarily focus on those two issues.

Predicate acts extending over a few weeks or months do not satisfy the requirements of closed-ended continuity. Libertad, 53 F.3d at 445 (citing H.J., Inc., 492 U.S. at 242 and Fleet Credit Corp., 893 F.2d at 446. In the case at hand, the eight viable predicate acts alleged by plaintiff occurred over a period of 20 months between January 1996 and September of 1997. A closer look reveals, in reality, all but two letters were sent within a 90 day period from June 1997 to September 1997.

The other two letters, one informing that there were construction cost overruns, and the other seeking capital contributions from the partners, were sent in January and October of 1996 respectively. Taking the common sense approach espoused by Congress, the Supreme Court and this Circuit,[3] and mindful of the lenient standard of review for motions to dismiss, these allegations do not rise to the level of a closed period of repeated conduct sufficient to establish a pattern of racketeering activity. The acts are simply too few and the time period too short, indicating that this case is a commonplace dispute among partners rather than the type of long-term criminal conduct sought to be deterred by the extraordinary remedy of RICO's treble damages. See, H.J., Inc. 109 S. Ct. at 2899. Furthermore, many of these letter exchanges centered around discrete disputes such as the cost overruns, refinancing, and disclosure of records. Thus, the few acts of fraud alleged refer to even fewer real events. Once again this tends to preclude a finding of long-term criminal conduct. The same result would likely have obtained even if plaintiff's excluded allegations of predicate acts had been part of the analysis.

Having determined that plaintiffs have not sufficiently established closed-ended continuity, the court turns its attention to whether plaintiff has shown a threat of ongoing criminal activity. Predicate acts threaten ongoing criminal activity when they demonstrate past conduct that "by its nature projects into the future with a threat of repetition." H.J., Inc., 109 S. Ct. at 2902. See, Ahmed, 118 F.3d at 889; Fleet Credit Corp., 893 F.2d at 447. This may be shown by demonstrating that the predicate acts, mail and wire fraud, were a regular way of conducting the Partnership's ongoing business. Fleet Credit Corp., 893 F.2d at 448.

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[3] See, Fleet Credit Corp., 893 F.2d at 447 (quoting H.J., Inc., 109 S. Ct. at 2899).

In this case, the allegations of predicate acts all germinate from disputes arising during the startup phase of construction and leasing of the hotel. The issues occurring at startup, even if a scheme, may have after-effects that project into the future as does virtually any business decision, but these circumstances do not indicate that mail and wire fraud are the means by which the Partnership conducts its general affairs. As the Court in Fleet pointed out, "a threat of continued criminal activity for purposes of RICO is not established merely by demonstrating that . . . acts of common law fraud are a regular way of conducting . . . ongoing businesses. Rather [plaintiff] must demonstrate that the predicate acts - here the acts of mail fraud-were a regular way of conducting the activities of mail and wire fraud would continue into the future even if the scheme itself were to continue. Id.[4] Because plaintiff has failed to allege sufficiently a pattern of racketeering activity, his claim for RICO violations cannot be sustained, even drawing all inferences in his favor.

III. Standing

Even if the complaint had properly pleaded a pattern of racketeering activity, an analysis of plaintiff's admixture of individual and derivative standing would not allow him to proceed.

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[4] Plaintiff's general contention that "the [Partnership] was and will continue to be a vehicle for the defendants to engage in racketeering activities," Dkt. No. 23, p. 27, without more, does not sufficiently indicate how or why the past predicate acts will continue into the future. The mere nondisclosure of Partnership records, which plaintiff insists is continuing, may well be a contractual violation, but it is not a criminal act of fraud; furthermore, the allegations are that this nondisclosure is for purposes of covering up past behavior, and not in furtherance of future frauds. Dkt. 23, pp. 20-21.

A. Individual Standing

The standing requirements for a civil RICO action are set forth in 18 U.S.C.A. § 1964(c) (West Supp. 1999). Plaintiff must show: (1) a violation of 18 U.S.C.A. § 1962; (2) injury to his business or property; and (3) a causal relationship between the violation and injury. Lincoln House, Inc. v. Dupre, 903 F.2d 845, 846 (1st Cir. 1990) (citing Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987).

Generally, a plaintiff shareholder does not have standing to assert a RICO claim Cir. 1990) (citing Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987).

Generally, a plaintiff shareholder does not have standing to assert a RICO claim based on derivative injuries. See, Bass v. Campagnone, 838 F.2d 10, 12 (1st Cir. 1988)(four members of trade union local could not sue the local's president for operating local as RICO enterprise when injuries alleged were a diversion of the local's funds, an injury to the local itself); Roeder, 814 F.2d at 29-30 (suit by shareholder for damages incurred to stock price by firm's payment of a bribe dismissed for want of standing). Courts have applied the rationale of derivative suits to limited partnerships along with corporations. Attick v. Valeria Assocs., L.P., 835 F. Supp. 103, 110 (S.D.N.Y. 1992)(denying standing to limited partners for pleading a derivative action under RICO); Abeloff v. Barth, 119 F.R.D. 332, 334 (D.Mass.1988)(Applying Fed. Rule Civ. P. 23.1, derivative pleading rule, to a limited partner). Indeed, special partnerships are persons under Puerto Rico law with the capacity to sue and be sued,[5] and the

[5] 10 L.P.R.A. § 1347 (1997); 31 L.P.R.A. § 104 (1993).

analogy to corporate derivative actions is strong.

In Bass v. Campagnone, 838 F.2d 10 (1st Cir. 1988), the First Circuit relied on Roeder, its own precedent, to uphold dismissal of the RICO claims of four union members against their local president when the plaintiffs alleged injury that was not unique to them. In short, the alleged injury, misappropriation of the local's funds, was an injury sustained by all union members equally and thus belonged to the union itself. This injury was therefore redressable by the union and was not actionable by its members as individuals. Id. at 12-13. The Court found that under Fed. R. Civ. P. 17(a), the plaintiffs were not the real parties in interest. Id. at 13.

In Roeder, 814 F.2d 22 (1st Cir. 1987), the Court determined that a shareholder could only recover as an individual when the injury sustained is "peculiar to him alone and does not fall alike upon other stockholders." Id. at 30 (quoting 12B W. Fletcher, Cyclopedia of the Law of Corporations, § 5913, at 434 (rev. perm. ed. 1984). The Court finally concluded that a RICO action to recover for injury to the corporation is an asset of the corporation that shareholders may not bring in their own names. Id. quoting Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2nd Cir.), cert. denied, 479 U.S. 987, 93 L. Ed. 2d 582, 107 S. Ct. 579 (1986).

In this case, plaintiff has not sustained an injury different from that allegedly caused the Partnership as a whole. The claimed injury is the same as to all other special partners. Plaintiff claims that he suffered unique injury because his interest in the Partnership was diminished, and attempts to draw a distinction between his case and jurisprudence to the effect that misuse of funds is an action belonging to the Partnership and not the partners.[6] However, as alleged in the

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[6] See e.g., Whalen v. Carter, 954 F.2d 1087 (5th Cir. 1992); Sears v. Likens, 912 F.2d 889 (7th Cir. 1990); Flynn v.

complaint, all special partners were called upon to make capital contributions or face a proportionate reduction of their equity. This in no way subjects plaintiff to treatment different from that of the other special partners. All were faced with the same choice of coming through with the money or an equity reduction. The fact that Plaintiff alone chose equity reduction rather than capital contribution does not make his relationship to the conspirators, the other partners, or the Partnership unique. He was given the same option as the other limited partners and merely exercised his preference. Plaintiffs claims are essentially accusations of the looting of Partnership funds and self-dealing,[7] bringing his claim squarely within the precedent of Bass and Roeder. As such, plaintiff may not sustain this action in his individual capacity because he is not the real party in interest under Rule 17(a).[8] Were the Court to allow plaintiff to recover individually, it may well prejudice the interests of the other "innocent" partners.

Merrick, 881 F.2d 446 (1989); Sparling v. Hoffman Const. Co., Inc., 864 F.2d 635 (9th Cir. 1988); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843 (2nd Cir.), cert. denied, 479 U.S. 987, 93 L. Ed. 2d 582, 107 S. Ct. 579 (1986); Attick v. Valeria Assoc., L.P., 835 F. Supp. 103 (1992).

[7] "Even before the time the hotel became operational, the RICO Defendants' goal was to dilute the interests of the Special Partners and to siphon away Partnership assets." Amended Complaint, Dkt. No. 36, P19.

[8] Rule 17(a) provides that a reasonable time after objection must be given before a claim may be dismissed to allow for joinder or substitution of the real party in interest. In this case, a sufficient period of time has elapsed since defendants' objection on grounds that plaintiff could not sustain an individual action.

B. Derivative Standing

Having determined that this RICO action is an asset of the Partnership, and therefore, if sustainable, is so only derivatively, the Court must now determine whether plaintiff has properly pleaded a derivative action under Fed. R. Civ. P. 23.1. Plaintiff has clearly not complied with the strictures of Rule 23.1 in that he has never verified the complaint,[9] nor included the specific allegations of his efforts in making a demand on the Partnership or that a demand would have been futile. The First Circuit has held the pleading of a demand or its futility to be a strict requirement warranting dismissal when plaintiffs do not comply.[10] Gonzalez Turul v. Rogatol Dist., Inc., 951 F.2d 1, 2 (1st Cir. 1991); Heit v. Baird, 567 F.2d 1157 (1st Cir. 1977). These strictures aside, plaintiff's derivative claim faces another significant, and ultimately fatal, defect; plaintiff does not fairly and adequately represent the interests of the other limited partners as required by Rule 23.1

It is clear that a derivative plaintiff need not represent the interests of all the other shareholders or partners, only those with whom he is "similarly situated." Fed. R. Civ. P. 23.1; Nolen v. Shaw-Walker Co., 449 F.2d 506 (6th Cir. 1971); Schupack v. Covelli, 512 F. Supp. 1310 (W.D.Pa. 1981). In

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[9] The closest plaintiff has come to verifying the complaint is the indication in his opposition motion that he would be willing to do so. Pl's. Opp'n Mot., Dkt. No. 48, p. 8. Unfortunately for plaintiff, Rule 23.1 is not satisfied by the intentions to verify but rather the act of verification itself.

[10] The Court notes that plaintiff has alleged self-dealing on the part of the RICO defendant partners with particularity even if he did not formally plead that a demand on the Partnership would have been futile. The Court further notes that plaintiff does not allege that he sought to have the other disinterested partners review or approve of his remedy.

this case, only two of the partners are not named as RICO conspirators allegedly benefitting from the illegal harm caused to the Partnership. The two partners thus similarly situated are FSBH and CDH. Indeed, plaintiff admits as much in his Complaint when he refers to himself, CDH, and FSBH as "victims," and draws a sharp distinction between this group of partners and the group he refers to as "RICO Defendants." Amended Complaint, Dkt. No. 36, P15-16.

The question then becomes whether plaintiff fairly and adequately represents the interests of FSBH and CDH for purposes of maintaining a derivative suit. There are several factors courts have used to determine adequacy of representation: (1)indications that plaintiff is not the true in interest; (2) unfamiliarity with the litigation; (3) degree of control exercised by attorneys over the litigation; (4) the degree of support received from other shareholders; (5) lack of personal commitment to the action; (6) the remedy sought; (7) relative magnitude of plaintiff's personal interest as compared with interest in derivative action itself; and (8) plaintiff's vindictiveness toward defendants. See, Smith v. Ayres, 977 F.2d 946 (5th Cir. 1992); Larson v.Dumke, 900 F.2d 1363 (9th Cir. 1990); Davis v. Comed, Inc., 619 F.2d 588 (6th Cir.), reh'g denied, 623 F.2d 28 (1980).

As with the trade union members in Bass, there are pleadings indicating that CDH and FSBH do not support this litigation. As defendants' point out in their motion to dismiss, Dkt. No. 43, pp.29-32, both CDH and FSBH were named by plaintiff as necessary parties in interest; neither has opted to join his cause. Instead, both CDH and FSBH have filed pleadings in which they demonstrate their opposition to this litigation. In its motion requesting a stay, Dkt. 40, FSBH asked for a stay of this case pending resolution of the standing issue, a legal stance directly opposed to that of plaintiff who has filed numerous motions opposing stay and requesting a lift of the stay imposed by the Court. Furthermore, in that motion, FSBH state that it was an entity "estranged to the facts contained in

the Amended Complaint.," and "should not be required to engage [in] a costly & time consuming extensive investigation." Dkt No. 40, P7. These statements filed by counsel for FSBH indicate that FSBH is opposed to plaintiff's suit. As to CDH, it has never filed a motion asking to join as a plaintiff during the pendency of this case. Rather, it, too, requested a stay of an answer under Rule 12(b), in which it stated that it would have to await discovery before taking a position and would like to wait until after resolution of the jurisdictional issues, Dkt. No. 45. Therefore, at the very least, there is a considerable lack of support for this litigation from the two partners similarly situated. As in Bass, the Court finds this lack of support to be highly persuasive.

In addition, the interests of plaintiff and partner CDH are divergent. As alleged in the complaint, CDH is a publicly funded corporation under the auspices of the Puerto Rico Board of Tourism. Its purpose is to promote the development of hotels in Puerto Rico as a means of benefitting the island's tourist economy. The interests of a governmental tourist organization in maintaining the operation of this hotel necessarily diverge from those of a private investor whose only interest in filing suit is a return on investment. The incentive of CDH is not return on investment, but the stable operation of the hotel as a boost to Puerto Rico's economy. The enormous money damages which plaintiff seeks, along with the other destabilizing remedies of reformation of the management agreement, leases and the Partnership itself threaten CDH's interest in maintaining the hotel while directly advancing plaintiff's interest in return on investment. It simply cannot be said that plaintiff would be willing or able to account for the necessarily broader interests of CDH nor the government of Puerto Rico in bringing his cause of action. It is therefore likely that CDH's interests will be disregarded in plaintiff's suit. See, G.A. Enterprises, Inc. v. Leisure Living Communities, Inc., 517 F.2d 24, 27 (1st Cir. 1975)(when a conflict of interest is "immediate and obvious," extrinsic facts of "sufficient strength" warrant dismissal under Rule 23.1).

Because plaintiff has not complied with the provisions of Rule 23.1, and because his interests diverge from, and he lacks the support of, the similarly situated partners, plaintiff is unable to bring his RICO claims as a derivative action.

IV. Supplemental Claims

The only two bases for jurisdiction alleged in the complaint are federal question, 28 U.S.C. § 1331 (federal RICO claims), and supplemental jurisdiction under 28 U.S.C. § 1367 (local law claims). Because the Court is dismissing plaintiff's federal RICO claims for want of standing and for lack of an adequate substantive basis in law, the local law claims now utterly predominate in this action.[11] Accordingly, the Court declines to exercise its supplemental jurisdiction over them in accordance with the rule of United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966). See, Feinstein v. Resolution Trust Corp., 942 F.2d 34, 47 (1st Cir. 1991).

WHEREFORE, The Court grants Defendants' motions to dismiss due to plaintiff's lack of standing and failure to adequately plead a federal RICO violation. Counts One and Two are therefore, hereby dismissed with prejudice. The local law claims, Counts 3 through 11, are hereby dismissed without prejudice. Judgment shall issue accordingly

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[11] The Court notes that at its heart, this matter is a bitter local law dispute between partners and that the local causes of action and remedies comprise nine out of eleven counts. Although the federal RICO claims arise from roughly the same nucleus of facts as those under local law, nonetheless, the Court could have found that the local law claims predominated even if the federal RICO claims had persisted.

IT IS SO ORDERED
In San Juan, Puerto Rico
This 14th day of April, 1999

HECTOR M. LAFFITTE

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1679

MANDATE

DAVID EFRON,
Plaintiff - Appellant

v.

EMBASSY SUITES, (PUERTO RICO), INC., A DELAWARE CORPORATION; EMBASSY SUITES, (ISLA VERDE), INC., A DELAWARE CORPORATION; FIRST BIG STEAKHOUSE, INC., A PUERTO RICO CORPORATION; PROMUS HOTEL CORPORATION, A DELAWARE CORPORATION; MORA DEVELOPMENT CORPORATION; CLEOFE RUBI-GONZALEZ; MORAIMA CINTRON-DE-RUBI; EMMA M. CANCIO-SANTOS; E.S. HOTEL ISLA VERDE, S.E.; CORPORACION DE DESARROLLO HOTELERO; FUNDACION SEGARRA BOERMAN E HIJOS, INC.,

Defendants - Appellees

Certified and Issued as mandate under Fed. R. App. P. 41
Phoebe Morse
Clerk
\s\
Deputy Clerk

BEFORE

Oct. 16 2000

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
Boudin, Stahl, Lynch, and
Lipez, Circuit Judges,

ORDER OF THE COURT
October 3, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the

suggestion for the holding of a rehearing en banc having been carefully considered by the Judges of-the-Court in regular active service and a majority of said Judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

By: \s\
Phoebe D. Morse, Clerk.

cc: [Ms. Del Carmen Taboas, and Messrs. Antonetti Zequeira, Bailey, Dershowitz, Diaz-Angueira, Feliberti, Lefranc-Morales, Marchand Nigaglioni, Pierluisi, Quintero, Sanchez-Betances]

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
FEB 1 2001
OFFICE OF THE CLERK

(2)

No. 00-1069

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID EFRON, INDIVIDUALLY, AS A CLASS A SPECIAL PARTNER OF E.S. HOTEL ISLA VERDE, S.E., A PUERTO RICO CIVIL PARTNERSHIP, AND FOR AND ON BEHALF OF THAT PARTNERSHIP,

Petitioner

v.

EMBASSY SUITES (PUERTO RICO), INC., EMBASSY SUITES (ISLA VERDE), INC., ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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9 pp

QUESTION PRESENTED

Whether this is an appropriate case to resolve the question presented when the petitioner did not raise the issue below and the lower courts therefore did not consider or discuss it and, further, in the presence of additional legal grounds to dismiss the civil RICO complaint.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were as follows:

Plaintiff-Appellant:

David Efron, Individually, as Class A Special Partner of E.S. Hotel Isla Verde, S.E., a Puerto Rico Civil Partnership, and for and on behalf of that Partnership.

Defendants-Appellees:

Embassy Suites (Puerto Rico), Inc. ("ESPR")
Embassy Suites (Isla Verde), Inc. ("ESIVI")
Promus Hotel Corporation ("PHC")
Mora Development Corporation ("Mora")
First Big Island Steakhouse, Inc. ("Steakhouse")
Cleofé Rubí González ("Rubí")
Moraima Cintrón de Rubí ("Cintrón")
Emma M. Cancio-Santos ("Cancio")
E.S. Hotel Isla Verde, S.E. ("ESHIVSE")
Corporación de Desarrollo Hotelero
Fundación Segarra Boerman e Hijos, Inc. ("FSBH")

Embassy Suites (Puerto Rico), Inc. and Embassy Suites (Isla Verde), Inc. are both wholly owned subsidiaries of Promus Hotels, Inc. Promus Hotels, Inc. is, in turn, a wholly owned subsidiary of Promus Hotel Corporation. Hilton Hotels Corporation is the parent company of Promus Hotel Corporation. There is no publicly held company that owns ten percent (10%) or more of Hilton Hotels Corporation's stock.

Neither First Big Island Steakhouse, Inc. nor Mora Development Corporation have parent companies and there are no publicly held companies that own ten (10%) percent or more of their stock.

RESPONDENTS' STATEMENT OF THE CASE

Early in 1995, petitioner David Efron ("Efron") entered into a Partnership Agreement with respondents Mora Development Corporation ("Mora"), Mr. Cleofé Rubí ("Rubí"), Corporación de Desarrollo Hotelero ("CDH"), Fundación Segarra Boerman & Hijos, Inc. ("FSBH") and Embassy Suites (Isla Verde), Inc. ("ESIVI") to build, operate and manage a $52.9 million hotel in Puerto Rico. Efron contributed approximately $5.9 million and received a twenty-two percent equity share in the property. (App. 2.) After construction was complete, respondent First Big Island Steakhouse, Inc. ("Steakhouse") rented space in the hotel to build and operate a restaurant. Emma Cancio, Esq. is the executive director and a minority shareholder of Steakhouse.

During the construction, the partnership's appointed managing partner, Mora, requested from Efron his proportional share of a partner's loan to cover construction cost overruns. Instead of paying his share of the loan, petitioner filed a RICO suit alleging that artificial cash shortfalls were intentionally created, through mail and wire fraud, and as part of a "scheme to defraud" him. As a result, he was pressured to "contribute additional capital to the Partnership or encounter a diminished investment opportunity." (Amended Complaint, ("complaint"), ¶ 60.) In fact, the Partnership Agreement, executed by Efron, provides for the reduction of a non paying partner's interest, if his proportional payment is not received. However, in response to a court order, petitioner admitted that he "...alone did not permit himself to be coerced into paying for ... cost overruns ..." (RICO Case Statement, p. 4.) As of today, petitioner has not responded to the partner's loan call, and, notwithstanding, his interest in the partnership has not been squeezed down. (Respondents Cancio's and Steakhouse's brief before the Court of Appeals, p. 9.)

The direct causal relationship between petitioner's injury and the asserted racketeering acts, that is, mail and wire fraud, was alleged to be that the special partners were deceived into believing that business was being properly conducted. (RICO Case Statement, at p. 35). The damages sustained by petitioner were described as petitioner's 22% share in "...the fraudulent construction cost overrun..." and other "fraudulent" expenses incurred by the partnership, as well as petitioner's interest in revenues lost. (Id., at 36.)

The Court of Appeals acknowledged that "the lack of causation seems to be a significant possibility." (App. 9.) The petitioner's prospect of having his equity position squeezed-down was found to be "...not necessarily a loss occasioned by misrepresentations or false assurances." (Id.) However, since its decision confirming the dismissal rested on other grounds, the appellate court found it "...unnecessary to explore further the question of whether the mailings caused a loss to the appellant." (App. 10)

The District Court, in addition to finding a failure to plead properly "a pattern of racketeering activity," held that petitioner had no individual or derivative standing. (App. 27-34) The District Court concluded that petitioner's injury was no different from the injury to the partnership. (App. 29) It further held that petitioner failed to comply with the requirements of Fed.R.Civ.Pro. 23.1 and that he does not represent fairly and adequately the interest of the other limited partners, as required to assert derivative standing.

The District Court dismissed the complaint after extensive briefing by the parties. Petitioner appealed to the United States Court of Appeals for the First Circuit and, when dismissal was affirmed, requested a rehearing with suggestion for rehearing en banc. Petitioner did not raise in the District Court, nor in the Court of Appeals the question presented in this

petition, whether it is improper to apply more stringent pleading requirements as to the "pattern of racketeering" element in a civil RICO action than in an criminal RICO indictment. Thus, the lower courts have not passed upon the question and the record is barren of discussion regarding it.

REASONS FOR DENYING THE WRIT

This Court has consistently held that it is only in exceptional cases coming before it from the federal courts that questions not passed upon by the lower courts are reviewed. Youkim v. Miller, 425 U.S. 231, 234 (1976); Pa. Dept. of Corrections v. Yeskey, 524 U.S. 206, 221 (1998); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2 (1970). Here, neither the record nor the petition shows the exceptional circumstances needed to consider the question presented for the first time. Also, the peculiar characteristics of this case advises against review by this Court. Absent from this case is an essential predicate of the question presented, i.e. that had this been a criminal case the action would not have been dismissed. Aside from the pleading defects upon which the decisions of the lower courts rest, petitioner's injury is unrelated to the predicate acts alleged. Further, petitioner lacks standing. Either of these grounds would also support the dismissal of the complaint.

This Court has held that, to state a RICO claim, plaintiff must show injury proximately caused by the racketeering activities alleged. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266-68 & n. 12 (1992); Beck v. Prupis, 529 U.S. ___, 146 L.Ed. 561, 572 (2000) (a person may not bring suit under 18 U.S.C. § 1964(c) predicated on a violation of 18 U.S.C. § 1962(d) for injuries caused by an overt act that is not a racketeering act under RICO). But petitioner's complaint fails to comply with this requirement. The petition itself shows that the acts allegedly performed in furtherance of the "scheme to defraud" harmed the partnership, not the

petitioner. (Petition, at p. 4.) The referred acts "...were designed to, and did, harm the partnership's financial position and create cash shortfall, which the defendant partners then used to justify repeated 'capital calls'..." (Id.) Allegedly, once this was accomplished petitioner was faced with capital calls which, if unanswered, raised his prospect of a squeezed-down equity position. This prospect was a by-product of petitioner's refusal to contribute the requested funds, not a result of misrepresentations in the alleged mails and wires. (App. 10) In fact, Efron alleged that the RICO violations "...permitted the defendants to fulfill their scheme by deceiving the special partners that business was being properly conducted, erstwhile those individuals conducted their misdeeds under unsuspecting eyes, except for Efron." (RICO Case Statement, at p. 35.) Efron, then, was not deceived by, nor his loss was a result of, the "scheme," the mailings or the wires in its furtherance. He was the only one who "discovered" the fraud. Not having been injured by the predicate acts, petitioner has no RICO cause of action. Only the remaining partners and the partnership were allegedly deceived, but none of them chose to join petitioner's complaint.

Finally, petitioner's alleged damages were described as his percentage in the alleged fraudulent expenses charged to the partnership and the construction cost overruns, as well as petitioner's interest in the revenues lost by the partnership. (RICO Case Statement, at p. 36.) But the need for additional monies, and the managing partner's right to impose a partner's loan, only arises if the partnership had no funds to pay for its expenses. Thus, the need to contribute more cash "merely reflects the decrease in value of the firm...". Bass v. Campagnone, 938 F.2d 10 (1st Cir. 1988). A RICO action to recover for injuries to the corporation is a corporate asset. Roeder v. Alpha Industries, Inc., 814 F.2d 22, 30 (1st Cir. 1987); cf., Holmes, 503 U.S. at 268 (no cause of action when plaintiff's damages flow from injury suffered by a third person.)

Faced with these facts, the District Court found that petitioner had no individual standing because he fell "squarely within the precedent of Bass and Roeder." (App. 30) Having also failed to comply with the requirements of a derivative action, petitioner could not maintain his suit as such either. (App. 31-34.)

Petitioner also entwined his request for damages, in his "not fully consistent allegations" (App. 15), with his assertion that the mail and wire fraud forced him to, either contribute the additional funds or face a reduction of his interest in the partnership. (Complaint, ¶ 60.) However, Efron has still not paid his share of the loan and his interest has not been diminished. Consequently, petitioner lacks the required injury to his "business or property" needed to assert a RICO civil claim. 18 U.S.C. sec. 1964(c).

Finally, there is no indication that the lower courts applied a stricter standard to petitioner's pleading of a "pattern" than would be required of a RICO indictment. The lower courts cited decisions of both civil and criminal RICO cases in support of their conclusions.

CONCLUSION

For all of these reasons, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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